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STATE OF WASHINGTON  
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NO. 96527-7

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,

Appellants,

v.

INLAND WASHINGTON, LLC, a Washington limited liability company, and INLAND GROUP P.S., LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,

Respondents.

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**BRIEF OF AMICUS CURIAE  
DEPARTMENT OF LABOR & INDUSTRIES**

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## I. INTRODUCTION

Workplaces are safer when general contractors protect all workers on a jobsite against hazards. For decades, the Court has affirmed this core safety principle. Specifically, the Court has held that a general contractor has a nondelegable duty under RCW 49.17.060(2) to ensure workplace safety and explained that a general contractor's supervisory authority gives it per se control over the workplace "to ensure compliance with safety regulations" under the Washington Industrial Safety and Health Act (WISHA). *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 463, 788 P.2d 545 (1990). General contractors have these duties because they are in the "best position" to ensure compliance with safety rules. *Id.* And worker safety has improved: in the almost three decades since *Stute*, the Department of Labor & Industries has observed improved safety at multi-employer worksites.

General contractors cannot hide behind subcontractors' bad behavior or negligence by delegating their safety responsibilities to subcontractors. The general contractor's duties under RCW 49.17.060(2) do not change even if a subcontractor created the unsafe condition because the general contractor had per se control over the condition.

This Court should reaffirm *Stute*'s safety principles.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

L&I is the state agency that creates and enforces the safety and health standards under WISHA. RCW 49.17.040; *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006). As the WISHA enforcement agency, L&I must strive to ensure “safe and healthful working conditions for every man and woman working in the state of Washington.” *See* RCW 49.17.010. The Court gives substantial weight to L&I’s interpretation of WISHA. *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014).

WISHA allows L&I to cite employers, including general contractors, for violating WISHA regulations. RCW 49.17.120(1). L&I’s regulatory power protects workers throughout the construction industry. L&I thus has a vital interest in how WISHA applies to general contractors.

## **III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE**

Given the important role of general contractors to ensure safety on a jobsite, does *Stute*’s holding that “[a] general contractor’s supervisory authority places the general in the best position to ensure compliance with safety regulations” make a general contractor responsible for safety violations created by a subcontractor on a jobsite?

## **IV. STATEMENT OF THE CASE**

### **A. Vargas Has Presented Evidence of WISHA Violations at the Jobsite Where He Suffered a Head Injury**



In May 2013, Gildardo Vargas stood on scaffolding in an open area visible to other workers on a jobsite. CP 1913, 1942, 1951, 2157, 2338, 2457. He stood near the end of a hose that ran from a concrete pumping truck to wall forms where he and other workers waited to pour concrete. CP 1913, 1942, 1951, 1980, 2157, 2338, 2457. Inland Washington LLC was the general contractor on the project. CP 2157, 2457. Ralph's Concrete Plumbing, Inc. owned and operated the concrete pump on the project at the time of the incident. CP 1900, 1913, 2157, 2338. Several workers from different subcontractors were working on the concrete pour. CP 2052, 2157.

As Vargas stood on the scaffold, a pressurized hose pumping concrete went out of control and struck him in the head. CP 1989. He was seriously injured due to violations of WISHA standards. CP 2157, 2162-63.

The operator's manual for the pump identified "considerable risk of injury from the end hose striking out when starting to pump." CP 1964, 1966. It required the operator to "[e]nsure that no-one is standing in the danger zone." CP 1964, 1966. Despite the manual's requirement that no one stand in the danger zone when the pump starts, several workers,

including Vargas, were in the danger zone when the pump started. CP

1922-23, 1964. This violated several provisions of WISHA.<sup>1</sup>

**B. Despite the Evidence of Safety Violations, the Superior Court Dismissed Vargas's Claims Against Inland**

Vargas sued Inland and two subcontractors in superior court, asserting various theories of negligence.<sup>2</sup> CP 1739-56. He asserted negligence claims against Inland for violating several WISHA regulations, or in allowing such regulations to be violated. CP 1751, 1857-58.

Vargas presented evidence of WISHA violations. Along with evidence that the pump operator was unfamiliar with the manual's safety requirements, Vargas presented evidence about violations of several other WISHA regulations. Vargas Supp. Br. 4-6. As another, independent basis to find a WISHA violation, Vargas presented evidence that the general contractor violated its duty under WAC 296-155-100(1)(a): "It is the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice . . . [a] safe and healthful working environment." WAC 296-155-100(1)(a).<sup>3</sup>

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<sup>1</sup> It violated provisions related to manuals. WAC 296-155-682(8)(c)(iii)(F), (G). It violated provisions related to accident prevention plans. WAC 296-155-110, WAC 296-800-140, WAC 296-800-14025. It violated rules related to training. WAC 296-800-130, WAC 296-800-13020, and WAC 296-800-13025.

<sup>2</sup> Vargas did not sue his direct employer, Hilltop Concrete Construction, Inc., because Hilltop is immune under RCW Title 51 and not a party to this action. CP 2457.

<sup>3</sup> Amicus BIAW is wrong to suggest that this single WISHA regulation about management's responsibilities "condenses the relevant statutory and case law" about a general contractor's duties under WISHA into a single standard. BIAW Br. 10-11.

Vargas also presented evidence that neither Inland nor Vargas's employer, Hilltop Concrete Construction, Inc., had a site-specific safety plan that addressed the hazards of concrete hoses or how to prevent hose injuries. Vargas Supp. Br. 5-6; CP 1857-58, 2163. WAC 296-155-110 requires accident prevention programs that are effective in practice and tailored to the hazards involved at the particular project. CP 2163-64; *see also* WAC 296-800-140, -14005.

Inland moved for summary judgment, arguing it violated no WISHA regulation.<sup>4</sup> CP 1652-54. Vargas argued that, under *Stute*, Inland had per se control over the workplace and that Vargas's injuries resulted from at least one of several WISHA violations. CP 1853, 1857-58. The

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Nothing in *Stute* or other cases provides for this. Although a general contractor must comply with this regulation, it also must "ensure compliance with WISHA and its regulations." *Stute*, 114 Wn.2d at 463. Its duty is not limited to complying with WAC 296-155-100(1)(a). L&I may cite general contractors for a violation of WAC 296-155-100(1)(a) or for failing to comply with or ensure compliance with a specific safety regulation. L&I recently changed its enforcement position to cite the specific safety regulation rather than WAC 296-155-100(1)(a). Dep't of Labor & Indus., DOSH Directive 27.00, *General or Upper Tier Contractor (Stute) Responsibility* (updated April 12, 2019), <https://www.lni.wa.gov/Safety/Rules/Policies/PDFs/WRD2700.pdf>. The reason the Board decision that BIAW cites refers to WAC 296-155-100(1)(a) is because L&I's former practice was to cite a general contractor under this rule, as L&I did in that case. BIAW Br. 12.

<sup>4</sup> Inland pointed to the fact that L&I did not issue a WISHA citation to it as a basis for its argument that there was no WISHA violation. That argument has no merit, as facts may develop throughout tort litigation that support the existence of a WISHA violation. L&I has a relatively short 6-month period from the time it opens a WISHA investigation to determine whether to issue a citation. *See* RCW 49.17.120. And L&I's action cannot preclude Vargas from asserting a WISHA violation as he was not a party to L&I's decision-making.

superior court granted Inland's summary judgment motion and dismissed it from the lawsuit. CP 2508-10.

This Court granted discretionary review under RAP 13.5.

## **V. ARGUMENT**

*Stute*'s holding that general contractors have a nondelegable duty to ensure safety on a jobsite and that they have per se control over a jobsite correctly reflects the reality of general contractors' role on a jobsite. Multi-employer jobsites require coordination and control. The general contractor has been hired to run the jobsite and complete the project safely. The general contractor plays a supervisory role and is in the best position to ensure safety across the jobsite.

Supervision is key to safety. That a particular subcontractor ends up creating an unsafe condition on a jobsite does not absolve the general contractor of its duties under *Stute*, as Inland would have it. Inland Supp. Br. 10-11. Because the general contractor has per se control over the jobsite, it is responsible for safety violations. The Court should re-affirm its long-standing precedent to ensure that general contractors continue to provide safe workplaces for all employees at their jobsites.

### **A. General Contractors Have a Nondelegable Duty Over Safety on the Jobsite, with Per Se Control Over Its Subcontractors' Safety Violations**

WISHA gives general contractors a nondelegable duty over safety, and this is not limited to times when the general contractor itself commits the safety violation, contrary to Inland’s arguments. Inland Supp. Br. 10-11. To the contrary, *Stute* contemplates that the general contractor will monitor and supervise its subcontractors’ actions to ensure that they are not creating workplace hazards.

**1. WISHA gives general contractors a nondelegable duty to protect all workers on the jobsite, as *Stute* holds**

All employers, including general contractors, must comply with WISHA’s safety regulations. RCW 49.17.060(2). WISHA’s purpose is to assure “safe and healthful working conditions for every man and woman working in the state of Washington,” and to “create, maintain, continue, and enhance the industrial safety and health program of the state.” RCW 49.17.010; *Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013) (“*Afoa I*”); RCW 49.17.010. The Court construes WISHA statutes and regulations “liberally to achieve their purpose of providing safe working conditions for workers in Washington.” *Frank Coluccio*, 181 Wn. App. at 36; RCW 49.17.010.

RCW 49.17.060(2) provides that “[e]ach employer”—including general contractors—“[s]hall comply with the rules, regulations, and

orders promulgated under this chapter.” This regulation places the duty on all employers to comply with safety regulations. *Stute*, 114 Wn.2d at 457.

*Stute* held that RCW 49.17.060(2) imposes on a general contractor a nondelegable duty to provide for safety on the jobsite, with per se control over the site. *Id.* at 464.<sup>5</sup> *Stute* found a general contractor responsible for a worker falling off a roof unprotected by scaffolding even though the subcontractor would also be responsible for the unsafe condition. 114 Wn.2d at 458, 462-63. *Stute* rejected the argument that a worker in a tort case—and, by extension, L&I in an enforcement action—must prove that the general contractor directly controlled a subcontractor’s work for the general contractor to be liable under WISHA. *Id.* at 460-64. The Court held, “A general contractor’s supervisory authority is per se control over the workplace, and the duty [to protect subcontractor employees] is placed upon the general contractor as a matter of law.” *Id.* at 464. It emphasized that the general contractor has a nondelegable duty to provide a safe workplace for employees of subcontractors. *Id.* at 463.

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<sup>5</sup> In *Afoa II*, in explaining its decision about joint and several liability, the Court included a misstatement about the law about general contractors: “A jobsite owner or *general contractor* will have [a duty of care] only if it maintains a sufficient degree of control over the work.” *Afoa v. Port of Seattle*, 191 Wn.2d 110, 121, 421 P.3d 903 (2018) (“*Afoa II*”) (emphasis added). The statement about general contractors was dicta because the case was about jobsite owners. *Id.* Inland’s suggestion that *Afoa II*’s discussion of vicarious liability changed *Stute* lacks merit. See Inland Supp. Br. 11-14.

So, under *Stute*, if a subcontractor violates WISHA, causing an injury to its direct employee, both the subcontractor and general contractor can receive WISHA citations and be subject to tort liability, unless the subcontractor is immune from tort liability. For example, workers must have fall protection when working at heights, and if a subcontractor's employee works on a roof without fall protection in violation of WISHA (as in *Stute*), the Department can cite the subcontractor and the general contractor for the safety violation because both owe a direct duty to ensure the worker is not subjected to the hazard of falling.

**2. A general contractor's duty under WISHA is statutory—not to be confused with the common law duty**

A general contractor's duty to ensure compliance with WISHA regulations on the jobsite covers all areas of the worksite, not just "common work areas" where multiple trades work together, as Inland argues. Inland Supp. Br. 8. Inland conflates the common law duty of care that a general contractor owes with its statutory duty of care under WISHA. They are distinct.

Under the common law, a general contractor has a duty of care to a subcontractor's employees to the extent the general contractor retains control over some part of the contractor's work. *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978). A plaintiff

can establish that duty by showing that a general contractor has supervisory and coordinating authority over multiple contractors in a common work area. *Kelley*, 90 Wn.2d at 331-32. But the Court has not limited a general contractor's duty to ensure compliance with WISHA regulations to common work areas. Under WISHA, a general contractor's "innate supervisory authority constitutes sufficient control over the workplace," not just over common work areas. *Stute*, 114 Wn.2d at 464.

### **3. Under *Stute*, a general contractor has direct liability for subcontractors' safety violations**

For years, L&I has held general contractors accountable when their subcontractors violate WISHA regulations because the general contractor controls conditions on the jobsite. *E.g., Express Const. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 594, 215 P.3d 951 (2009).<sup>6</sup> L&I holds general contractors accountable even when a general's subcontractor would also be responsible. *Id.* That is because general contractors have a duty under *Stute* to ensure compliance with WISHA regulations across the

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<sup>6</sup> See also *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 40, 156 P.3d 250 (2007); *Fisher & Sons, Inc.*, No. 08 W1136, 2009 WL 6058166 at \*3-4 (Wash. Bd. Indus. Ins. Appeals, Oct. 15, 2009); *Mediterranean Pac. Corp.*, No. 06 W0162, 2007 WL 3054885 at \*3-4 (Wash. Bd. Indus. Ins. Appeals, June 28, 2007); *Masterkey Constr.*, No. 00 W1367, 2001 WL 1464551 at \*3-4 (Wash. Bd. Indus. Ins. Appeals, Sept. 7, 2001); *Lanzce G. Douglass, Inc. v. Dep't of Labor & Indus.*, No. 35399-1-III, 2018 WL 6002931 at \*7 (unpublished opinion) (Wash. Ct. App. Nov. 15, 2018); *Dep't of Labor & Indus. v. Howard S. Wright Constructors LP*, No. 73943-3-I, 2016 WL 3919704 at \*7 (unpublished opinion) (Wash. Ct. App. July 18, 2016).



jobsite—such a violation is called a “*Stute* violation” in WISHA compliance and litigation lingo.

Relying on the tort principle of vicarious liability, Inland argues that a general contractor’s liability under *Stute* and WISHA is limited to its direct violations of WISHA. Inland Supp. Br. 10-11. It argues that general contractors cannot be vicariously liable for another’s WISHA violations. Inland Supp. Br. 16.

But Inland mistakes the law. A general contractor’s liability under *Stute* for a subcontractor’s violations is not vicarious; it is direct because the general contractor has an affirmative duty to “ensure compliance with safety regulations” whether or not a subcontractor created the unsafe condition. *Stute*, 114 Wn.2d at 463; *see Express Const. Co.*, 151 Wn. App. at 594; *J.E. Dunn Nw., Inc.*, 139 Wn. App. at 40; *Fisher & Sons, Inc.*, 2009 WL 6058166 at \*3-4; *Mediterranean Pac. Corp.*, 2007 WL 3054885 at \*3-4; *Masterkey Constr.*, 2001 WL 1464551 at \*3-4. Direct liability is responsibility for breach of one’s own duty of care, while vicarious liability is responsibility for breach of another’s duty of care. *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 749, 875 P.2d 1228 (1994); *accord Black’s Law Dictionary* 1055 (10th ed. 2014) (vicarious liability occurs when a supervisory party is responsible for the actionable

conduct of a subordinate). A *Stute* violation involves the general contractor's own duty of care.<sup>7</sup>

For a *Stute* violation, the general contractor's own conduct is at issue. If the general contractor fails to ensure compliance with WISHA regulations on a jobsite that it controls, leading to a hazard, the general contractor has violated its own duty. *See Express Const.*, 151 Wn. App. at 599.

Inland cites a passage in *Stute* for the proposition that liability occurs only “when a party asserts that the employer did not follow particular WISHA regulations.” Inland Supp. Br. 10 (quoting *Stute*, 114 Wn.2d at 457). But Inland ignores *Stute*'s holding, which did not limit a general contractor's responsibilities to those situations that it created but also to situations that a subcontractor created. *Stute*, 114 Wn.2d at 463. In *Stute*, the subcontractor did not provide scaffolding (contrary to its duty), but the general contractor was also responsible because it had a direct duty to the subcontractor's employees. 114 Wn.2d at 457, 462-63. The Court

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<sup>7</sup> The same result would occur in this case whether Inland's liability is called “direct” or “vicarious.” *Stute* supports that the liability is direct as the general contractor there violated its own duty to ensure compliance with safety regulations. *Stute*, 114 Wn.2d 464. Another case has categorized the liability as vicarious. *See Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 893, 313 P.3d 1215 (2013). Even so, *Millican*'s central holding that the general contractor is responsible for its subcontractors' violations of WISHA is correct. *See id.* Inland's call to overturn *Millican*—and, by extension, *Stute*—should be disregarded as it does not show either decision is incorrect or harmful. Inland Supp. Br. 12, 14.

held that the general contractor had the duty to “ensure compliance with WISHA and its regulations”:

Inasmuch as both the general contractor and subcontractor come within the statutory definition of employer, the primary employer, *the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations*. A general contractor’s supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the general contractor.

*Stute*, 114 Wn.2d at 463 (emphasis added).

*Stute* identified methods that general contractors could use as part of their affirmative duty to ensure compliance with WISHA regulations. The Court stated that general contractors had the responsibility to “furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.” *Stute*, 114 Wn.2d at 464. This statement confirms the oversight duty of the general contractor on the worksite and offers methods to help ensure compliance. Amicus BIAW cites this statement out of context to assert that a general contractor can comply with its duty under *Stute* through contract alone, *e.g.* by “contracting with a reliable subcontractor to provide safety equipment . . . .” BIAW Br. 13. This argument misunderstands *Stute*, runs contrary to its spirit, and ignores that the general contractor’s duty is nondelegable. General contractors must ensure compliance with all

WISHA regulations. *Stute*, 114 Wn.2d 464. *Stute* would have no meaning if general contractors could assign their duty to another entity through contract without the need to exercise any further oversight to ensure safe work on the worksite. That is why the duty under *Stute* is nondelegable. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002).

It would fundamentally change the law to give a general contractor a pass for safety violations because a subcontractor's employees created the unsafe work condition. This would ignore *Stute*'s holding that general contractors' supervisory authority "places [them] in the best position to ensure compliance with safety regulations." *Stute*, 114 Wn.2d at 463.

#### **4. L&I does not impose strict liability on general contractors**

A general contractor's duty to create a safe workplace does not subject it to strict liability for a WISHA citation. *Contra* Inland Supp. Br. 6. Inland is wrong that there is no defense against a claim that a general contractor violated a duty established by WISHA for a citation. Inland Supp. Br. 16. In a WISHA enforcement action, the general contractor's actual or constructive knowledge of the violation must be proven. *See Express Const.*, 151 Wn. App. at 599 (general contractor could have known about the violation in the exercise of reasonable diligence). Actual or constructive knowledge is an element of a violation of WISHA: to

violate WISHA a contractor must know or could have known about the violation with the exercise of reasonable diligence. RCW 49.17.180; *Potelco Inc. v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 34, 361 P.3d 767 (2015)<sup>8</sup>

Under WISHA, a general contractor would violate WISHA by failing to ensure safe operation of the concrete pump in accordance with the operator's manual. WAC 296-155-682(8)(c)(iii)(F), (G). A contractor is found to have constructive knowledge of a violation if it is in plain view. *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 440, 377 P.3d 251 (2016).<sup>9</sup>

#### **B. General Contractors' Duties Under WISHA Are Critical to Protecting Workers**

Important principles of workplace safety animate *Stute*: a "general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory

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<sup>8</sup> In a case that amicus BIAW cites, L&I raised an alternative argument that the general contractor was strictly liable under *Stute* because its subcontractor violated a WISHA regulation. BIAW Br. 13 (citing *Lanzce G. Douglass, Inc.*, 2018 WL 6002931 at \*5). Upon review of *Lanzce G. Douglass*, L&I realized this was an incorrect position, and L&I does not now agree with the former strict liability position it raised for the first time in *Lanzce G. Douglass*. In an enforcement action, the general contractor violates WISHA if it knew or could have known about the unsafe condition in the exercise of reasonable diligence. RCW 49.17.180(6).

<sup>9</sup> See also *Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 10, 18, 432 P.3d 404 (2019); *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011); *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 110, 161 P.3d 387 (2007).

authority constitutes sufficient control over the workplace.” *Stute*, 114 Wn.2d at 464. Assigning to the general contractor a duty to ensure compliance with safety regulations furthers WISHA’s purpose to “assure safe and healthful working conditions for every person working in Washington.” *Kamla*, 147 Wn.2d at 122 (quoting *Stute*, 114 Wn.2d at 464). This is because general contractors have “knowledge [and] expertise about WISHA compliant work conditions.” *Id.* at 124.

The reasons underlying *Stute* in the past remain relevant at multi-employer worksites today. General contractors are in the best position to:

- Ensure compliance with WISHA regulations over worksites with many and varied hazards because they oversee the worksite and have “the greater practical opportunity and ability to insure compliance with safety standards.” *Stute*, 114 Wn.2d at 462; *Kamla*, 147 Wn.2d at 124.
- Influence work conditions. *Kamla*, 147 Wn.2d at 124. They have the means to ensure that subcontractors fulfill their obligations about worker safety. *Stute*, 114 Wn.2d at 463.
- Coordinate work among subcontractors in a way that enhances safety. *Stute*, 114 Wn.2d at 462.
- Provide expensive safety equipment if it is required. *Stute*, 114 Wn.2d at 462.

Following *Stute*, L&I has observed improved safety at multi-employer worksites. L&I's ability to cite general contractors for failing to protect their subcontractor employees is an important and effective enforcement tool. Subcontractors are often small, unsophisticated companies, while general contractors are in the business of managing work sites. This gives general contractors special expertise over safety. And because general contractors want to minimize safety violations, they create incentives for subcontractors to promote safety across the worksite. This enhances worker safety.

If the rule of law was that a general contractor did not have per se control over the jobsite and so had no nondelegable duty to ensure WISHA compliance, general contractors may abandon their responsibility to ensure compliance with safety regulations on the worksite. Such a rule of law would motivate general contractors to look the other way about safety and to take a hands-off approach. Perversely, an absentee general contractor with little oversight of its workplace would escape liability for safety violations where a more diligent general contractor would not.

Inland says that it lacks specialized safety knowledge, so it hired subcontractors to provide this knowledge. Inland Supp. Br. 9, 19. And Inland says that there are too many safety rules to comply with. Inland Supp. Br. 9, 19. But a general contractor cannot delegate its duty about

safety to a subcontractor, and it can resolve any concerns about specialized safety issues by ensuring that it hires contractors with the necessary skills, experience, and safety record. Often general contractors designate a safety officer or hire an outside firm to act as a safety coordinator.<sup>10</sup> A general contractor can provide oversight on the site to make sure safety procedures are followed, and can set consequences for its subcontractors if they cut corners. A subcontractor wants to be paid, so a contract provision that punishes it for safety violations presents a powerful incentive to do the job right. Subcontractors with poor safety records face financial consequences because safety-conscious general contractors will not hire them.<sup>11</sup>

General contractors and subcontractors have been operating under *Stute*'s parameters since 1990 with no disarray. For the almost 30 years that *Stute* has been the law, Inland's parade of horrors of following *Stute* has not happened. *See* Inland Supp. Br. 16-19. General contractors have defenses, have not been treated as insurers (there still must be showings of actual or constructive knowledge and that the WISHA violation caused the

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<sup>10</sup> Puzzlingly, Inland says "having two safety supervisors on one job is a recipe for disaster," presumably one from the general and one from the subcontractor. Inland Supp. Br. 8. To the contrary, this supervision doubles safety precautions.

<sup>11</sup> Amicus BIAW suggests that because general contractors are also subject to tort liability, subcontractors will not be motivated to protect workers. BIAW Br. 19. This is nonsense. Non-employer subcontractors are also potentially liable in tort. Employer subcontractors have the prospect of increased L&I taxes with more injuries. WAC 296-17-870. And a clean safety record also motivates subcontractors to protect their own and others' employees. *See also* RCW 49.17.190(3) (criminal liability under WISHA).



injury), and have obtained insurance to cover their risks even though they cannot sue immune employers. *Contra* Inland Supp. Br. 16-19.

Inland correctly counsels the Court that “the very concept of a safe workplace is at stake.” Inland Supp. Br. 19. Indeed, the safety and lives of thousands of working men and women in this State are in danger if the worker safety protections enshrined in *Stute* are eroded. This Court has emphasized the “deterrent effect of workplace safety enforcement” through third-party actions like this one. *Carrera v. Olmstead*, 189 Wn.2d 297, 310, 401 P.3d 304 (2017). Our State’s founders recognized the value of workplace safety regulations by specifically requiring workplace safety laws in the state constitution. Wash. Const. art. II, § 35. Inland’s proposal to massively change workplace safety by gutting *Stute* should be rejected.

## **VI. CONCLUSION**

This Court should reaffirm decades of case law protecting workers and prevent general contractors from abandoning their responsibilities for worker safety. L&I urges the Court to reaffirm its decision in *Stute*.

RESPECTFULLY SUBMITTED this 13th day of May, 2019.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

GILDARDO CRISOSTOMO VARGAS,  
an incapacitated person, by and through  
WILLIAM DUSSAULT, his Litigation  
Guardian ad Litem; LUCINA FLORES,  
an individual; ROSARIO  
CRISOSTOMO FLORES, an individual;  
and PATRICIA CRISOSTOMO  
FLORES, a minor child by and through  
LUCINA FLORES, her natural mother  
and default guardian,

Appellants,

v.

INLAND WASHINGTON, LLC, a  
Washington limited liability company,  
and INLAND GROUP P.S., LLC, a  
Washington limited liability company,  
RALPH'S CONCRETE PUMPING,  
INC., a Washington corporation, and  
MILES SAND & GRAVEL COMPANY  
d/b/a CONCRETE NOR'WEST, a  
Washington corporation,

Respondents.

**CERTIFICATE OF  
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor and Industries' Brief of Amicus Curiae and this Certificate of Service in the below described manner:

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